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No. 583

In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

V.

HOMER H. JOHNSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR RESPONDENT

DON W. STEWART,
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NEBRASKA LAW BRIEF PRINTING CO., LINCOLN, NEBRASKA

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In the
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PRELIMINARY STATEMENT

It is desirable to first correct some erroneous conceptions of this action which appear in petitioners' brief.

First, the primary purpose of this action was to declare void and cancel a fraudulent *lease* of a radio station. The *license* to operate the station was only incidentally involved and there was never any claim that its transfer to the lessee was fraudulent. While the prayer did ask that the assignment of the license as well as the lease be declared void and cancelled (R. 10), the cancellation of the license was eliminated by the pleadings and so held by the court below in its second opinion (R. 798). Petitioners repeatedly refer to the cancellation of the license despite the fact that it was eliminated as an issue (All italics herein are supplied).

Second, the interest of the listening public was not involved for it is conceded that the station has been well operated by the Society and by the lessee.

If considered on its merits the fundamental question before this court is whether the Communications Act is to be construed to give the Commission exclusive jurisdiction over the subject matter of this action and thus deprive the court below of jurisdiction to cancel the fraudulent lease. *This question was not raised by petitioners until after the lease had been ordered cancelled by the court below.* We make this statement of the fundamental question because so much of petitioners' brief is devoted to a discussion of immaterial matters and criticisms of the decision of the court below thereon.

There are a number of inaccurate statements in petitioners' brief due probably to the fact that Mr. Fly, who submitted the brief for petitioners, has only recently ap-

peared in the case. The record is voluminous and it is understandable that inaccurate statements might be made by one who had not been connected with the case in the trial court or the court below. Consideration of this question is also rendered difficult because petitioners completely changed their position after the court below reversed the trial court. Prior to that time they had acknowledged the court's jurisdiction to determine the validity of the lease, but since then, they contend the court had no jurisdiction whatever. (The record and briefs show numerous changes of petitioners attorneys.)

PETITIONERS STATEMENT ON QUESTIONS PRESENTED

It is respondent's contention that none of the questions listed by petitioners (p. 2) present a question which justifies this court in reviewing the case on its merits. When analyzed the rights claimed in two of them (3 and 5) were specifically recognized by the court below and the remaining ones were not considered by it because not raised at all or not in time (R. 798). Therefore, since no federal rights "specially set up or claimed" by petitioners have been denied, no question is presented under Sec. 237 (b) of the Judicial Code.

The only question that could possibly be considered is whether the Communications Act confers exclusive jurisdiction on the Commission of this action and therefore the court below was without any jurisdiction whatever of the subject matter of the action. Some changes have been made by petitioners in the questions from their wording as they appear in the petition for certiorari (p. 3). Question 5 which appears as 3 in the petition for certiorari has been changed by omitting the word "exclusive", pre-

ceding "jurisdiction," and by adding at the end the words "and by deciding matters affecting the public interest." These questions will be discussed later.

ADDITIONAL STATEMENT OF THE CASE

We believe it will be helpful to first state all material occurrences in chronological order and then call attention to certain inaccuracies in petitioners statement of the case.

Material Occurrences

1. On October 3, 1942, the petitioner, Woodmen of the World Life Insurance Society (hereinafter referred to as the Society, or lessor) leased its radio station for 15 years to petitioner, Radio Station WOW, Inc., (hereinafter referred to as lessee) and subject to the approval of the Commission, assigned to the lessee the license to operate the station (R. 21-27).

2. On October 7, 1942, the Society and lessee filed a joint application with the Commission for consent to transfer the station license (Ex. 29, R. 375, 376).

3. On November 23, 1942, respondent, as a member of the Society, commenced this action to have the lease declared void because procured by fraud from the Society and to cancel the lease and assignment of the license (R. 1-10). The cancellation of the assignment of the license was later eliminated by the pleadings (See p. 23 hereof).

4. On December 15, 1942, the Commission gave its consent to the assignment of the license which was effective for 30 days (Ex. 32, R. 661, 662A).

5. On January 5, 1943, the Society and lessee filed a joint petition with the Commission, setting forth the pend-

ency of respondent's action, and requested the consent to the assignment of the license be extended "until final adjudication of the action" (Ex. 33, R. 665, 667-669).

6. On January 12, 1943, the Commission denied the aforesaid petition (Ex. 34, R. 664). No appeal was taken from that order by either the Society or lessee.

7. On January 14, 1943, the station and license were transferred by the Society to lessee (R. 177).

8. On March 15, 1943, the trial court held that respondent had not established fraud and dismissed the case (R. 735-737).

9. On March 10, 1944, the Supreme Court of Nebraska entered a judgment reversing the trial court, finding that the lease to the station, the lease to the space occupied by the station, and the transfer of the license should be vacated and set aside (R. 744-745). On the same day an opinion was filed holding that the lease was fraudulently procured from the Society (R. 745-761).

10. On March 30, 1944, petitioners filed motions for rehearing and for an affirmance of the judgment of the district court dismissing the action. It was asserted therein, *and for the first time*, that the Nebraska courts had no jurisdiction of the action because jurisdiction was vested in the Commission and the decision deprived them of their property in violation of the Constitutions of the United States and of Nebraska (R. 769-775).

11. Thereafter, on March 30, 1944, petitioners filed motions to dismiss the action because the court had no jurisdiction over the subject matter, and exclusive jurisdiction was in the Commission (R. 775-6, 782).

12. On May 26, 1944, the court denied the motions for rehearing and to dismiss (R. 793-794). On the same day it filed a supplemental opinion in which it stated the jurisdiction of the Commission was only over the transfer of the license and the court had jurisdiction of all other issues; that the claim that this action was to set aside an order of the Commission was without merit and was eliminated from the case by the pleading; that there never had been any contention to the contrary; that under the Nebraska practice the constitutional questions could not be considered because not raised in the trial court (R. 794-799).

Nature of the Action

We do not accept petitioners' statement (p. 5) of the nature of the action as being accurate. So far as is now material, this is an action on behalf of all members of the Society to declare fraudulent and void and to cancel a lease of the Society's radio station because the rental payable thereunder is grossly inadequate, the provisions of the lease are inadequate to protect the Society, the lessee is without adequate financial responsibility and the officers of the Society violated their duties and the trusts reposed in them as officers in making the lease (R. 1-10).

Petitioners (p. 7) in describing the nature of the action omit numerous allegations from the petition such as the fact that the Society's net income from the station was rapidly increasing and was estimated $278,641.54 for 1942 (R. 3) and the rental payable to the Society under the lease was only an average of approximately $74,000 a year which was grossly inadequate (R. 5 and 6). Peti-

tioners state (p 7) the petition alleges the "great value of the station" but we find no such allegation.

The petition does not allege the assignment of the license was fraudulent, in fact it does not even allege the license was assigned although the prayer asks that the assignment be cancelled (R. 1-10). Cancellation of the license was specifically eliminated from the act... by the answer of the Society and its officers (R. 11, 21) and the respondent's reply (R. 35, 36).

The statement as to the petition is otherwise inaccurate and incomplete and the order in which the allegations appear in the petition have been so changed by petitioners as to require a reference to the petition itself upon any material point. This is especially true of petitioners' efforts to show that a question of public interest was involved because of allegations with reference to the threatened use of the station for propaganda purposes. This issue was eliminated by the decree of the trial court that it was not sustained by the evidence (R. 735) and the court below made a similar holding (R. 753-754).

Orders of the Federal Communications Commission

Petitioners refer (p. 8) to the inventory of the station property, income statement of the Society and balance sheet of the Society and of the lessee as being attached to the application to the Commission for consent to the assignment of the license. The documents mentioned are set forth in the appendix to petitioners' brief but none of them are contained in the record. Strangely neither the Society or the lessee, who filed the application, or their attorneys, had a copy of the application at the trial so respondent introduced a copy which he had secured but no documents were attached to it (R. 369-370, 372-373,

Ex. 29, R. 375, 376). Petitioners discuss (pp. 9-10) the consent given by the Commission to the assignment of the license but refers to it as an "order." (Infra p. 50).

First Opinion of the Supreme Court of Nebraska

Petitioners (p. 11) state that in its first opinion the court below found "that no officer or director would gain directly or indirectly by the assignment of the license and by the lease of the station facilities" (R. 745, 754-755). There is no such finding or holding in the opinion with refernce to the assignment of the license. The opinion does not discuss the circumstances under which the assignment of the license was procured.

Raising of the Federal Questions

Petitioners (pp. 11-12) state that after the judgment of the court below, they filed motions to dismiss and motions for rehearing, challenging the court's jurisdiction. The facts are that the petitioners first filed motions for rehearing (R. 769, 778) in which they asked the court "to grant a rehearing of the issues involved," and affirm the judgment of the trial court. Reasons included the claim that the court below had no jurisdiction of the subject matter and the insufficiency of the pleadings and evidence (R. 769, 778). *After* filing motions for rehearing, petitioners then filed motions to dismiss (R. 775, 782).

We will call attention in our argument to other instances where the petitioners' statements are not accurate and might unintentionally mislead the court.

SUMMARY OF ARGUMENT

I.

The Judgment Is Not Final Within the Meaning of Section 237 (b) of the Judicial Code

The judgment does not "terminate the litigation • • • so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437. A further trial will be necessary as to at least five questions.

"A judgment reversing that of the court below and remanding the case for further proceedings is not" final. *Haseltine* v. *Central National Bank*, 183 U. S. 130, 131.

Cases cited by petitioners are distinguishable because of material differences in facts such as judgments directing *immediate delivery* of property, specifically *reserving* certain issues, or the accounting ordered was only ministerial and not a part of the relief prayed for.

II.

The Federal Questions Raised by the Petition For Certiorari Were Not Properly Presented in the Record

The rights claimed by petitioners namely, the judgment invaded the jurisdiction of the Commission (1) by deciding a question of interest to the listening public and (2) by nullifying the consent of the Commission to the assignment of the license, were not "specially set up or claimed" as required by Sec. 237 (b) so as to bring them to the attention of the state court. *Green Bay and Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67-68.

The rights claimed by petitioners as to the public interest were decided *in their favor* in both courts below. The jurisdiction of the Commission over the assignment of the license was admitted in the pleadings and was so held in the court below and the so-called "order" related only to the license, so was not nullified by the judgment below. The other federal questions were not raised in the court below or were not considered or necessary to support the judgment rendered.

A judgment may not be reviewed unless the court's decision on the federal question was "essential to the judgment rendered," *Montana* v. *Rice*, 204 U. S. 291, *Lynch* v. *New York*, 293 U. S. 52, 54. The only such question was that the court below had jurisdiction of the action to cancel a fraudulent lease.

Petitioners requested the courts below to decide whether the lease should be cancelled and *never questioned its right to do so until after an adverse decision.*

III.

Communications Act Does Not Exclude the Jurisdiction of the State Court Over this Action

State courts have all judicial power not surrendered by them to the United States and federal courts should "scrupulously confine their own jurisdiction to the *precise limits* which the statute has defined." *Healy* v. *Rotta*, 292 U. S. 263-270. Jurisdiction of federal court is not exclusive unless "manifested by clear language," *Plaquemines* v. *Henderson*, 170 U. S. 511; nor is it exclusive under the commerce clause, *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 476; and it is "the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal

authority into the orderly functioning of a states' judicial process." *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 135.

The Communications Act when reasonably construed does not give the Commission and federal court exclusive jurisdiction of this action for (1) it shows it was not so intended, (2) it does not contain words which can be so construed, (3) it recognizes non-exclusive jurisdiction, (4) exclusive jurisdiction is not necessary to accomplish its regulatory purpose, (5) administrative construction is non-exclusive jurisdiction, (6) it does not contain adequate provision for determining actions of this character, (7) it would establish an undesirable precedent.

Such a construction would be tenuous, perhaps unconstitutional as usurping the judicial power of the states and should be avoided "if fairly possible," *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390.

IV.

The State Court Had Jurisdiction of the Action and Petitioners Assented Thereto

The question of fraud in procuring the lease is one that is within the general jurisdiction of the state court. Petitioners, having asked both courts below to determine that question, have no right after an adverse decision to question its jurisdiction. The primary jurisdiction doctrine is not properly before the court because not raised in the court below but in any event it is not applicable for no question requiring technical knowledge of the Commission is involved, *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139. Furthermore it was waived by not being claimed in the courts below.

The fact that the station license is incidentally involved did not deprive the state court of jurisdiction. *Pratt* v. *Paris Co.*, 168 U. S. 255, 259, *Becher* v. *Contoure Laboratories*, 279 U. S. 388, 391.

Petitioners cannot question the jurisdiction of the courts below after assenting thereto and in fact asking a decision on the merits. This is true even where statutes confer exclusive jurisdictions on federal courts, *Mays* v. *Fritton*, 87 U. S. 414.

V.

The Judgment Below Does Not Invade the Jurisdiction of the Commission

The jurisdiction of the Commission was not invaded because the only matter in which it was interested was the license, and the judgment specifically recognized the Commission's jurisdiction thereover. Furthermore, the judgment did not nullify an order of the Commission for it was merely a consent and applied only to the assignment of the license. Respondent could not have maintained a suit under Sec. 402 (a), *Pittsburgh and W. Va. Ry.* v. *United States*, 281 U. S. 479, 486.

No question of the listening public in the continued proper operation of the station was ever involved except incidentally in connection with the claim that it was to be used for propaganda purposes. *The decision of both courts below was in petitioners' favor on this point.* There is no reasonable basis for claiming that the public interest would be served by now holding valid the lease which was fraudulently procured.

ARGUMENT

I.

JUDGMENT IS NOT FINAL WITHIN THE MEANING OF SECTION 237 (b) OF THE JUDICIAL CODE

No final judgment was entered by the court below. A further trial of importance will be necessary before a final judgment or decree can be entered by the trial court. Examination of the judgment (R. 744) discloses that evidence will be required in the trial court on at least five of its seven "directives" listed by petitioners (p. 17).

Evidence will be required to identify the $25,000 of accounts to be returned. Some have probably been paid and lessee will therefore have to account for the amount collected. Accounting for the operation of the station since January 14, 1943, will require evidence to determine the income and operating expenses and there probably will be some dispute as to what items are proper operating expenses to be deducted from the income. Evidence will be required to determine what is necessary for lessee to do to accomplish the return of the license. In view of the second opinion of the court below (R. 794), this may necessitate the filing of an application by the Society and lessee requesting the consent of the Commission to the assignment of the license to the Society. Likewise evidence will be required to determine what else is necessary to restore the parties to their position prior to the lease.

Furthermore evidence will be required to determine the expenses that the Society has had in connection with the transfer of the station and license to lessee and to return to the Society which are to be paid by lessee. It is probable that there will be some dispute as to what items are to be included in such expense. Also the costs in a case of this character include compensation to respondent's

attorneys and evidence will be necessary to show the services rendered and the value thereof.

All of the foregoing matters require a consideration of the evidence offered by the parties and a decision thereon by the trial court. Such a decision is obviously of a judicial character and under the authorities now cited the judgment is not final under Sec. 237 (b).

A test of the finality of a judgment under Sec. 237 (b) of the Judicial Code is stated in *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437, as follows:

> "While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that, in order to give this court appellate jurisdiction, the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.' *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and cases cited."

Application of the foregoing rule to the present judgment shows clearly that it is not final. If this court affirmed the judgment it cannot be said that "the court below would have nothing to do but to execute the judgment or decree it had already entered." The case was remanded to the trial court where evidence would have to be taken on the various matters mentioned in the judgment and it clearly contemplates that the final judgment will be entered by the trial court after a further trial. Under the foregoing test the judgment of the court below is not final so as to give this court jurisdiction.

Another well-recognized rule to determine the finality of a judgment is stated in *Haseltine* v. *Central National Bank*, 183 U. S. 130, 131, as follows:

> "We have frequently held that a judgment reversing that of the court below and remanding the case for further proceedings is not one to which a writ of error will lie."

Under the foregoing rule the judgment in the present case is not final because it reversed the trial court and remanded the case for further proceedings.

In *California National Bank v. Stateler,* 171 U. S. 447, it was held that a judgment on appeal reversing the trial court and directing the delivery of securities and money after making a reasonable allowance to one of the parties for costs and attorney's fees "lacks finality" in two particulars, one of which was "it would certainly be necessary for Chetwood to prove up his costs, disbursements, and attorney's fees before the amount for which he is ultimately made liable could be ascertained." By analogy, the judgment in the present case "lacks finality" because "it would certainly be necessary for" respondent "to prove up his costs, disbursements, and attorney's fees before the amount for which" petitioners are "ultimately made liable could be ascertained." The foregoing case has been cited repeatedly by this court as authority for dismissing an appeal for want of jurisdiction. One of these is *Edgar Bros. Co. v. State Revenue Commission,* 303 U. S. 626.

Petitioners (pp. 18-19) cite six cases to support their statement that the judgment is final within the meaning of Sec. 237 (b). However, an examination of these cases discloses that the first three involve the finality of a judgment of a federal court rather than a state court, which is covered by a different statute, and in those same cases the trial court ordered *immediate delivery* of the property to the plaintiff but specifically reserved certain items

for further consideration which was held to not affect the finality of the rest of the decree. Other facts as will be shown distinguish all of the cases from the present case.

In *Forgay* v. *Conrad*, 47 U. S. (6 How.) 201, and *Thomson* v. *Dean*, 74 U. S. (7 Wall.) 342, cited by petitioners (p. 19), the court called attention to the possibility of irreparable injury if an appeal was not allowed because *immediate delivery* of the property was ordered. Similar injury in the present case as suggested by petitioners (p. 19) could not occur because they retain possession, the only change being from lessee to lessor. Those cases are discussed in *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429, 431, which held they did not apply. It is said:

> "There is no order as in *Forgay* v. *Conrad*, 6 How. 201; *Thomson* v. *Dean*, 7 Wall. 346, and other cases of a like character, adjudging the property to belong absolutely to the appellee, *and ordering immediate delivery of possession.*"

The Forgay and Dean cases, supra, are likewise distinguished in *Collins* v. *Miller*, 252 U. S. 364, 371.

Petitioners (p. 19) also cite *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180, which was an appeal from federal court direct to the Supreme Court. The trial court entered a decree cancelling a lease and directing the surrender and delivery "forthwith" of the leased property which was the subject of the suit and ordered that an accounting be taken before a master of profits realized from the property. The court specifically "reserved to itself such further directions as may be necessary to carry this decree into effect." The court held the decree final for the purposes of appeal because the property had been ordered surrendered "forthwith," "the accounting ordered is only in aid of the execution of the decree and is

no part of the relief prayed for in the bill," because "nothing now remains to be done but to carry what has been decreed into execution" and plaintiffs "are entitled to the immediate execution of such a decree." The present case differs in every one of the foregoing respects.

It will be observed that the basis of the decision in the foregoing case is similar to both the Forgay and Dean cases, supra. Furthermore, the court recognized that if the accounting ordered was a part of the relief prayed for in the bill, the judgment would not be final. In the present case the judgment of the court below among other directions orders an accounting of the operation of the station by the lessee and payment by the lessee of the expenses incurred in connection with the transfer of the lease and license. Respondent's petition (R. 10) did not specifically ask for an accounting of the operation of the station because at the time the petition was filed the station had not yet been transferred to the lessee. However, the petition did specifically ask that the society be paid all of its expenses incurred in connection with the lease and assignment of the license and prayed "for such other, further and different relief as equity and justice may require." (R. 10). The court below construed a prayer for general relief to be sufficient to include "any judgment to which the party is entitled under the pleadings and evidence" (R. 796). The accounting ordered of the operation of the station as well as payment of the expenses in connection with the transfer of the station under the lease and the transfer of the license constituted a construction by the court below that respondent was entitled to an accounting under the pleadings and evidence. It therefore cannot be said that the accounting of the operation of the station by the lessee and for the

expenses of transferring the station under the lease the transfer of the license "is no part of the relief prayed for."

We do not believe the foregoing cases cited by petitioners which we have discussed sustain the finality of the judgment in the present case. It is significant that in each one of them, a decree in favor of the plaintiff was entered by the trial court and directed immediate delivery of the property so that if this court affirmed the decree the trial court would have nothing to do but to execute the decree already rendered, as stated in *Georgia Ry. Co.* v. *Decatur*, supra (p. 14). In the present case, of course, there is no judgment or decree to be executed because the one entered by the trial court has now been set aside and a new one must be entered after a determination of the matters required by the judgment of the court below. If the foregoing cases should be construed to apply to the situation such as exists in the present case, they are not in harmony with many later cases such as *Keystone Co.* v. *Martin*, 132 U. S. 91, *McGourkey* v. *Toledo R. Co.*, 146 U. S. 536, *Martinez* v. *International Banking Corp.*, 220 U. S. 214, *George* v. *Victor Talking Machine Co.*, 293 U. S. 377, and *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, already discussed (p. 14).

Petitioners cite (p. 19) *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, but it does not sustain the finality of the judgment in the present case. In that case, suit was brought to recover a canal but the suit was dismissed. On appeal it was reversed and a judgment entered for the plaintiff and ordering an accounting of receipts and disbursements from the property. The right of the plaintiff in that respect was specifically ordered to "be reserved."

In holding that the judgment was final, the court said on page 372:

> "In the case at bar there is distinct and explicit finality, and the further proceedings are directed to apply only to the 'questions reserved.' And it is to be assumed this was purposely done to give finality to the questions not reserved, so that the decree could be *immediately executed* upon the property involved requiring it to be delivered into the possession and administration of the state."

It therefore appears that by directing further proceedings should apply only to "questions reserved," the judgment thus became final as to the remaining questions and therefore could be reviewed. No such situation exists in the present case.

Gulf Refining Co. v. *United States*, 269 U. S. 125, 135, cited by petitioners (p. 19), is not adverse to our contention but in fact directly supports it by stating:

> "The general rule established by many decisions, of which *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, is an example, is that the face of the judgment is the test of its finality and that by this test a *judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final.*"

It is true that in the foregoing case the judgment was held final although it ordered an accounting but the amount due under the accounting was an exact sum set forth in the stipulation of the parties. On this point the court said on page 136:

> "There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the

power of alteration. It follows that the jurisdictional objection is without merit."

The present case presents quite a different situation because as shown there will necessarily be evidence taken relating to the numerous issues remaining undetermined.

In *Knox National Farm Loan Association v. Phillips*, 300 U. S. 194, cited by petitioners (p. 19), a money judgment was allowed and a receiver appointed to liquidate the business of the defendant. This court held the judgment was final, but the case materially differs from the present case as shown by the following statement, 198:

> "The Association and its officers were not directed to account, and to surrender what was found owing at the close of the accounting. They were directed to make delivery and to make delivery at once."

The inference is that if an accounting had been directed as in the present case, the judgment would not have been a final one.

It therefore appears that the judgment should not be considered final under Sec. 237 (b) because it fails to meet the well established requirements set forth in *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437, that it

> "must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

and because as stated in *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135,

> "the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final."

II.

THE FEDERAL QUESTIONS RAISED BY THE PETITION FOR CERTIORARI WERE NOT PROPERLY PRESENTED IN THE RECORD

Respondent contends that the federal questions raised by the petition for certiorari were not properly presented in the record because no federal rights "specially set up or claimed" by petitioners under the Constitution or laws are shown to have been denied to them. Such a showing is essential under Sec. 237 (b) of the Judicial Code.

The statement in the motions for rehearing and to dismiss that the court below had no jurisdiction of the subject matter can hardly be said to constitute a federal right "specially set up or claimed" because it contains no reference to a provision of the Constitution or laws. While this court has held a question of the jurisdiction of a federal court may be raised at any time, that refers to entire absence of jurisdiction.

The federal questions were not properly presented in the trial court. They were waived in the court below unless it had no jurisdiction whatever and none of the questions properly raised in the court below were decided against petitioners. The burden of showing that this court has jurisdiction rests on petitioners, *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651, and the rules require petitioners to specifically point out in the record the portions that confer jurisdiction on this court (Rule 12, para. 1). We will, therefore, discuss the foregoing points in connection with our consideration of petitioners' argument thereon under appropriate subheadings.

A. The Federal Questions Were Not Adequately Raised In the Trial Court

Petitioners assert (p. 22) the federal questions were adequately raised in the trial court under the principle "clear intendment." This principle is stated in *St. Louis Iron Mountain and Southern Ry. Co. v. Starbird*, 243 U. S. 592, 598, cited by petitioners (p. 22), but the following important requirement of the rule is not included in petitioners' quotation:

> "It is enough that it (the federal right) be relied upon and in a proper manner called to the attention of the court * * * *it is the right* * * * *which must be brought to the attention of the state court.*"

As stated in *Green Bay and Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67-68, cited by petitioners (p. 22), the federal right must be

> "*specially set up or claimed* in the state court in such manner as to bring it to the attention of that court."

Measured by the foregoing standards, petitioners did not adequately raise any federal question in the trial court. *Furthermore the questions which petitioners claim were raised related only to the jurisdiction of the Commission over the assignment of the license.* None of the pleadings can be construed to claim as stated by petitioners (p. 51) that the Commission had exclusive jurisdiction "over the transfer of the facilities" or that the court had no jurisdiction thereof. The public interest was not even mentioned in the questions presented in the petition for certiorari except as to primary jurisdiction which was not raised in the court below. Public interest has now been added to question 5. (Supra p. 4). Thus the only federal questions relied on by petitioners are not properly

presented. The issue of public interest, namely use of the station for propaganda purposes, was decided in petitioners favor (infra 7) and the "order" which the petitioners claim was nullified was a consent to the assignment of the license *and did not cover the transfer of the station* (Ex. 32, R. 661, 662A).

Petitioners refer (p. 20) to a motion filed by lessee and Gillin to strike a part of plaintiff's petition. This motion and the ruling thereon were not a part of the record in the court below or considered by it and are not now entitled to consideration (R. 785-791).

Nor did the answers filed by petitioners raise any other question. The answer of lessee and Gillin (R. 31) merely alleged that pursuant to the "orders" of the Commission on December 15, 1942, and January 12, 1943, the application for consent to assignment of the license was approved and the parties "directed to effectuate said assignment" and pursuant thereto the station had been transferred to lessee who has since been operating the station under the lease and orders of the Commission.

Neither of these "orders" directed the assignment of the license or the transfer or operation of the station (Ex. 32, R. 661, 662A, Ex. 34, R. 664). This answer did not even contain an allegation that the Commission had jurisdiction over the assignment of the license.

The answer of the other petitioners so far as related to any federal question merely alleged that the Commission

> "has and concedes that it has no jurisdiction over the subject matter of plaintiff's action except jurisdiction to determine the transfer of the license . . . which jurisdiction was exercised in the approval of the transfer of said license" (R. 21).

Respondent admitted such jurisdiction of the Commission in his reply (R. 36).

Petitioners claim (p. 23) that the allegation as to the Commission's jurisdiction was subject to a further exception is unreasonable and not supported by the language used in the answer or the record which fails to show any order "to execute and perform the provisions of said lease by virtue of which possession of said leased property has now been delivered to the lessee" (R. 21). The so-called "order" was merely a consent to the assignment of the license (Ex. 32, R. 661, 662A).

None of the pleadings can possibly be construed to do more than allege that the Commission had jurisdiction over the *assignment of the license.*

The court below very properly held the question of the jurisdiction of the Commission over the assignment of the license "was eliminated from the case by the pleadings" (R. 798) *and no other federal right was mentioned in the pleadings.* Thus no "federal right specially set up or claimed" was denied to petitioners.

B. Some Jurisdictional Questions May Be Waived

Petitioners do not claim that any federal right was raised in the pleadings except as heretofore mentioned. They assert (p. 23) that the federal questions could not be waived since they involved jurisdiction over the subject matter. However, the federal questions to which petitioners refer relate *only* to the jurisdiction of the Commission over the assignment of the license. It is true that this court has held the question of the jurisdiction over a federal court may be raised at any time but this refers to utter lack of jurisdiction. As elsewhere shown

(p. 28) the state courts have all jurisdiction not relinquished to the federal government in the Constitution and the jurisdiction of the state and federal courts may be concurrent. An objection that the Commission or federal court had primary jurisdiction, if valid, was waived by failure to assert it in the trial court. Objection to a state court's jurisdiction because of exclusive federal jurisdiction is waived if not timely made. (Infra p. 47).

C. Questions Passed Upon by Court Below Are Not Properly Presented Unless Their Determination Was Necessary to the Decision Rendered

Petitioners assert (p. 24) that "all of the federal questions were explicitly raised" in the court below "by motions to dismiss and for rehearing, which motions were considered and decided on their merits." With two exceptions the only federal rights which were "claimed or set up" in the court below were that the Commission had exclusive jurisdiction over the assignment of the license and that the federal court had jurisdiction to review an order of the Commission. Petitioners there claimed in substance that neither court "ever acquired jurisdiction over the subject of this action" because the action was one to annul an order of the Commission made under the provisions of the Communications Act. However, the order referred to could only be the consent of December 15, 1942, to the assignment of the license (Ex. 32, R. 661, 662A). Thus the right "claimed or set up" was at most that the Commission and federal court had exclusive jurisdiction over the assignment of the license.

The two exceptions mentioned above are; first, the general claim that the court below did not have jurisdiction over the subject matter of the action which is discussed elsewhere (p. 47) and second, constitutional questions

which the court below properly refused to consider because not previously raised as required under Nebraska practice (R. 798). *Herndon* v. *Georgia*, 295 U. S. 441, 443.

The court below specifically recognized the jurisdiction of the Commission over the license but held such jurisdiction

> "does not deprive the state court of jurisdiction to hear and decide all other property rights in a radio station and the rights of the party incident thereto" (R. 797).

Since no federal right "specially set up or claimed" by petitioners has been denied, the only possible question is whether the court below had no jurisdiction whatever over the subject matter of the action, for which no reason was given in the court below.

Petitioners contend (pp. 28-29) that even though federal questions were not raised, they are now properly presented because the court below passed upon them. The rule mentioned by petitioners is subjected to a further qualification that a judgment may not be reviewed unless its decision on the federal question "was essential to the judgment rendered." *Montana* v. *Rice*, 204 U. S. 291, 299. *Lynch* v. *New York*, 293 U. S. 52, 54. The court below decided that the Commission had exclusive jurisdiction over the license and its assignment but that the state court had jurisdiction of the action to cancel the fraudulent lease. No other questions were "essential to the judgment rendered." Therefore, discussion of any other questions determined by the court below is unnecessary in determining whether a federal question was properly presented in the record.

III.

COMMUNICATIONS ACT DOES NOT EXCLUDE JURISDICTION OF STATE COURT OVER THIS ACTION

The only question which it can be seriously claimed has been properly raised and presented is that the court below did not have jurisdiction over the subject matter of this action. The basis for such a claim, namely, that the Communications Act grants exclusive jurisdicton to the Commission and federal courts, is unsound and contrary to the provision of the Act and well established principles of statutory construction. The Act clearly limits the jurisdiction of the Commission to matters relating to the proper operation of the station in the interest of the listening public and recognizes that its jurisdiction is not exclusive. The provisions of the Act requiring the consent of the Commission to an assignment of the license to operate the station cannot be reasonably extended to include a transfer of the station and its equipment. Nor can the Act be logically construed to require a controversy of this nature to be determined only by the Commission. Such an extension of the jurisdiction of the Commission is quite unnecessary to accomplish the purpose of the Act, that is the regulation of broadcasting. Such purpose can be accomplished by licensing the *operation* of stations more effectively than by licensing the ownership or possession of stations. In any event Congress chose the former method and the responsibility for changing it rests with Congress, not the court.

We believe it will be helpful to consider the jurisdiction of the state courts under the United States Constitution and then, by analyzing the Communications Act, endeavor

to demonstrate that a reasonable construction does not exclude the state court from jurisdiction over this action. These points will now be discussed under appropriate sub-headings.

A. Jurisdiction of the State Court

It is well established that the states have all judicial powers not surrendered by them to the United States in its Constitution. *Tennessee* v. *Davis*, 100 U. S. 257. The jurisdiction thus conferred by the Constitution should be confined to the precise limits of the statutes enacted thereunder. In *Healy* v. *Ratta*, 292 U. S. 263, 270, it is said:

> "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. See *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 233, 234. *Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.*"

The general jurisdiction of the state courts over a fraud action of this character (eliminating for the moment the provisions of the Communications Act) is established by the decision of the court below and by the Nebraska Constitution, laws, and decisions, and we assume it will not be questioned. The decision of the state court that it has jurisdiction should be accepted by this court unless it determines that such jurisdiction is excluded by the Communications Act. *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 477.

The jurisdiction conferred by an Act of Congress on the federal court is not necessarily exclusive. It is for

Congress to determine whether jurisdiction of the federal courts shall be exclusive or concurrent of controversies arising under the laws of the United States. *Bowles* v. *Willingham*, 321 U. S. 512.

In discussing the extent to which federal legislation limits the jurisdiction of a state in the same field, it is said in *Kelly* v. *Washington*, 302 U. S. 1, 10:

> "And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced."

Nor is exclusive jurisdiction conferred unless such an intention is "*manifested by clear language.*" *Plaquemines* v. *Henderson*, 170 U. S. 511, 517.

This apparent reluctance to extend the exclusive jurisdiction of federal courts may be due to the fact that it is the duty of the state courts to enforce rights secured by the Federal Constitution and laws. In *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463, 479, it is said:

> "It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive (citing many cases) . . . . Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them. *Robb* v. *Connolly*, 111 U. S. 624, 637."

Unless Congress confers exclusive jurisdiction on the federal courts, its jurisdiction is merely concurrent with the state courts and the commerce clause of the Constitution has been construed to give the federal courts *concurrent rather than exclusive jurisdiction.*

In *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 476, it is said:

> "The appellant relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. *This view of that clause is quite inadmissible.* It has no support in any quarter, is at variance with the actual practice in this class of litigation. (citing many cases) • • • and is in conflict with the doctrine often sustained by this court that *the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts* • • • (citing many cases.)"

If the state and federal courts have concurrent jurisdiction, then the principle of comity is applicable and supports the jurisdiction of the state court. In *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118, 135, the court quotes with approval from *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 235, as follows:

> "The rank and authority of the (federal and state) courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a

court of the other jurisdiction is a rule of right and of law based upon necessity, • • •

"*The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process.* The reciprocal doctrine of the res cases is but an application of the reason underlying the Act."

Guided by the foregoing well established rules related to the jurisdiction of the state court, we will consider under appropriate headings, the construction of the Act.

B. The Communications Act When Reasonably Construed Does Not Give the Commission or Federal Courts Jurisdiction Over This Action

When the Communications Act is given a reasonable, logical, and realistic construction, it does not grant to the Commission or the federal courts exclusive jurisdiction over this action and unless it clearly excludes the jurisdiction of the state court over the cancellation of the fraudulent station's lease, the respondent is entitled to have the petition for certiorari dismissed or the judgment of the court below affirmed.

The Act when reasonably construed does not give the Commission and federal courts exclusive jurisdiction of this action for (1) it shows it was not so intended, (2) it does not contain words which can be so construed, (3) it recognizes non-exclusive jurisdiction, (4) exclusive jurisdiction is not necessary to accomplish its regulatory purpose, (5) administrative construction is non-exclusive jurisdiction, (6) it does not contain adequate provision for determining actions of this character, (7) it would establish an undesirable precedent. These points will now be discussed separately.

1. The Act Shows It Was Not Intended to Give the Commission Exclusive Jurisdiction

The primary purpose of the Communications Act as stated in Section 1 is to regulate radio "so as to make (it) available so far as possible to all the people of the United States." The "public interest" is also the standard governing the transfer of licenses because section 310 (b) of the Act provides in substance that a license shall not be transferred unless the Commission shall "decide that said transfer is in the 'public interest'." The words "public interest" has been described by this court in *National Broadcasting Co. v. United States*, 319 U. S. 190, 216 as "the interest of the listening public in 'the larger and more effective use of radio'."

It clearly appears from the Communications Act and cases construing its provisions that the act was intended to provide an administrative agency charged only with supervision of radio facilities to the end that the interest of the listening public be promoted by securing the best possible broadcasting service. No such question is involved in the present case for the competent staff that operated the station for the Society was transferred with the station to the lessee and continued its operation (Ex. 29, R. 375, 376, 397).

It, therefore, appears that the Communications Act was not intended to give the Commission jurisdiction to determine whether the lease of this station was procured by fraud for such an action does not involve the "public interest" as those words are used in the Communications Act.

2. THE ACT DOES NOT CONTAIN WORDS WHICH CAN BE CONSTRUED TO GIVE EXCLUSIVE JURISDICTION

The Communications Act does not contain words specifically giving the Commission jurisdiction of an action of this character nor does it contain general words which could be properly construed to give the Commission such jurisdiction. *Its language clearly limits the jurisdiction of the Commission to questions involving the proper operation of stations in the public interest.* The provisions of Section 310 relating to a transfer of a station license is clear and unambiguous. It states:

> "(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred * * * unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

It mentions the station license, the frequency and the rights herein, but it does not mention the station or its equipment, nor is any language used which can be reasonably construed to cover a station or its equipment. Neither in specific nor general language does it give to this Commission jurisdiction to determine a question as to whether the transfer of the station and its equipment was made under a lease secured by fraud on the lessor.

If Congress had intended to require the consent of the Commission to a transfer of a station or its equipment, it would have been very simple for it to have inserted in Section 310 (b) quoted above after the word "granted" the words "the station and its equipment." The fact that words of the character mentioned were not included indicates a clear intention that the transfer of a station

and its equipment should not require the consent of the Commission. To read into the Act, particularly Section 310 (b), words covering the station and its equipment, would be unjustified and contrary to the well recognized rule that where the words of a statute are plain the court will not add to or alter them. *Matson Navigation Company* v. *United States*, 284 U. S. 352, 356.

The words used in the act so far as material to this case are ordinary ones and should be given their ordinary meaning. As the court said in *Federal Communications Commission* v. *Associated Broadcasters*, 311 U. S. 132, "Primarily our task is to read what Congress has written." "We are not at liberty to construe language so plain as to need no construction." *Helvering* v. *City Bank Farmers Trust*, 296 U. S. 85, 89.

The words "station license" clearly means a license to *operate* a station. We do not find any place in the Act where the word "license" can be reasonably construed to include a station and its equipment. The words "license" and "station" are repeatedly used, not interchangeably, but showing that they cover different subjects. A licensee "means the holder of a radio station license" (Sec. 3 (c)), and a station "means a station equipped to engage in radio communication" • • • (Sec. 3 (k)). Likewise, station equipment is referred to as "instrumentalities, facilities, apparatus," • • • (Sec. 3 (b)).

Congress was obviously concerned about the character of equipment installed in a station, and its operation, but not with its ownership or a controversy not affecting its proper operation. The Act has been thus construed in *Southern Broadcasting Co.* v. *Carlson*, 187 La. 823, 175 So. 587, where it was held that the Act was not intended

to place settlement of disputes of a personal or private nature by the individuals in the Commission.

Congress evidently believed regulation of broadcasting could be accomplished by control over the *operation* of the stations. This control is exercised through licenses to operate the stations. In *Federal Communications Commission* v. *Sanders Brothers*, 309 U. S. 470, 474, it is said:

> "The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the *use* of radio frequencies by prohibiting such *use* except under license."

Thus the court recognized regulation is accomplished through licensing the *use* of stations rather than licensing the *ownership* of stations. Such regulation appears adequate for a station can not be used without a license. No sound reason for licensing the ownership of a station exists.

Congress apparently felt that control of the use of stations by licenses was adequate and perhaps realized an attempt to license the ownership of stations might be unconstitutional and jeopardize the entire Act. It is a well recognized rule "that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score." *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 390. *Lewellyn* v. *Fick*, 268 U. S. 238, 251. *Lucas* v. *Alexander*, 279 U. S. 573, 577.

The regulation of radio broadcasting is exercised under the commerce power. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, and jurisdiction of state court should not be displaced unless such an intent clearly appears. In *Mauer* v. *Hamilton*, 309 U. S. 598, 614, this rule is stated as follows:

> "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred *unless clearly indicated* by those considerations which are persuasive of the statutory purpose."

Applying the foregoing rules to the language used in the act shows clearly that it should not be construed to give the Commission exclusive jurisdiction over the transfer of a station or exclusive jurisdiction of this action to cancel a fraudulent station lease.

3. The Act Recognizes That the Commission Does Not Have Exclusive Jurisdiction.

Not only does the Communications Act contain no provision giving the Commission jurisdiction over an action of this character, but on the contrary it carefully preserves the existing remedies under the common law or by statute. Section 414 provided:

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies."

Petitioners' attempt (pp. 74-75) to brush aside section 414 because it was not in the Radio Act of 1927 and assert it has no application to the present case. It must have been included in the Act of 1934 for some purpose. The words used are not ambiguous and a reasonable interpretation would be a recognition of existing common law remedies such as the right of a state court to pass upon a question of fraud in connection with a lease of a station.

This court has recognized that the Communications Act does not give the Commission unlimited power over radio

stations. In *Federal Communications Commission* v. *Nelson Bros.*, 289 U. S. 266, 285, it is said:

> "In granting licenses the Commission is required to act 'as public convenience, interest and necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power."

It would appear that the right of respondent to have the courts of Nebraska decide whether the lease should be cancelled because of fraud was not taken away by the Communications Act but was, in fact, recognized and preserved by the Act.

4. No Sound Reason Exists for Giving the Commission Exclusive Jurisdiction

There does not appear to be any sound reason for giving the Commission jurisdiction, and certainly not exclusive jurisdiction, over the transfer of a radio station. The Communications Act limits the jurisdiction of the Commission to matters relating to the *operation* of stations in the public interest. Controversies which do not involve the proper operation of a station do not affect the public interest and so the Commission was not given jurisdiction of such controversies.

What logical basis is there for giving the Commission jurisdiction over an action for the cancellation of a station lease where no question as to the proper operation of the station is involved? What difference could it make to the public whether the lessor is receiving an adequate or inadequate rent? That is a question of private rights over which the Commission has no jurisdiction or concern.

The Commission so held in The Matter of Selma Seitz, 7 F. C. C. 315, 318, where in connection with transfer of a license the Commission said:

"The contract price here presented is not commensurate with the actual values of the intangibles and intangibles to be transferred. In this connection, we doubt seriously whether there is any item of a tangible nature here listed to which a value may reasonably be attached. However, our primary consideration from the standpoint of the public interest, deals not with the prevailing relationship between contract price and the items to be transferred, but rather with the qualifications of the proposed transferees and their abiltiy to provide the public with an improved broadcasting service" (citing other similar holdings).

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138, the court in recognizing that the purpose of the Communications Act was to solve administrative problems rather than conflicting private rights said:

"The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."

Later (p. 141) the court refers to the Commission as an "administrative agency." Whether the lease was fraudulently procured from lessor involves "the adjudication of conflicting private rights," and is entitled to a judicial rather than administrative determination.

As elsewhere shown (p. 35) the Act was passed to regulate broadcastng and this was accomplished through licensing the *operation* of the stations. Such regulation is completely effective without control over the possession, ownership, or transfer of stations. Therefore, no sound reasons exist for reading into the Act words to give the Commission jurisdiction over the transfer of station,

and certainly not words to give it exclusive jurisdiction to determine whether such transfer was procured through fraud on the lessor.

5. The Act Has Been Construed by the Commission Not to Give it Exclusive Jurisdiction

In resolving doubt as to the proper construction of a law administrative construction is entitled to consideration, *Mintz* v. *Baldwin*, 289 U. S. 346, 351. The record in this case shows affirmatively that the Commission concedes it has no jurisdiction over the subject matter of this action except over the transfer of the license (Supra p. 23).

Furthermore, it was specifically recognized by the Society and lessee when they petitioned the Commission to extend its consent to the assignment of the license until "the rights of the parties should be fully adjudged in said action" (Ex. 33, R. 665, 669). The reference, was of course, to the present action. Also, in other proceedings, the Commission has recognized that it does not have jurisdiction over similar questions.

In a situation almost identical with the present case, the Commission held that a state court had exclusive jurisdiction to decide whether a sale of a station and its facilities should be rescinded because of "fraud, duress, conspiracy, and undue influence" and it refused the plaintiff's application for leave to intervene in order to request the Commission to defer action on defendant's application for consent to the assignment of the license to a third party. The proceeding "In Re Application for Consent to the Assignment of License to Station WMCA" is referred to by petitioners (p. 69, note 29). In its opinion the Commission says:

"As a legal matter, however, petitioner's argument misconceives the respective jurisictions of the Court and this Commission. On the ~~other~~ one hand, *the Court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and other assets of station WMCA. The Commission has no power to act with respect to these matters* and any action it takes in the present proceedings will not affect the Court's jurisdiction."

The Commission did just what the court did in the present case —that is, held that the Commission had jurisdiction of the license and the court jurisdiction over the validity of the transfer of the station and its equipment. Except for the so-called "power issue" the interest of the listening public was just as much involved in the continued proper operation of the station, for if the sale were rescinded plaintiff would be entitled to the possession of the station and its equipment. This construction of the action by the Commission which is just the same as the courts below is entitled to serious consideration. Mr. Fly was then chairman of the Commission and the decision appears to have been unanimous.

6. The Act Does Not Contain Adequate Provisions for Determining This Action

Another reason why it appears that the Communications Act was not intended to give the Commission jurisdiction over an action of this character is the lack of an adequate provision for the determination of such a controversy. There is "no statutory preparation for the organization of such machinery." *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380, 392. Nor has

the Commission under its rule-making power promulgated any rules which provide for such determination.

The Commission is recognized as an administrative agency rather than a part of the judicial branch of the Government. An action to declare void and to cancel a lease because it has been procured by fraud should be entitled to consideration by a court qualified and experienced in determining the important legal questions involved. The absence of adequate provisions in the Act for judicial disposition of such an action indicates that the Commission was not intended to have jurisdiction thereof.

Petitioners suggest (p. 78) that respondent "should have submitted his public interest questions to the Commission for its expert consideration, and if dissatisfied with its action * * * appealed to the federal court, pursuant to section 402 (a)." Respondent would not be entitled to appeal from the Commission's consent to the assignment of the license. (Infra p. 53). But even if he were, he would not be entitled to a trial *de novo* but only a review limited to determining whether errors of law were committed by the Commission. *Scripps Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 10. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227. Thus, respondent would be deprived of a judicial trial on the important question of fraud in the procurement of the lease. Such a harsh result should not be imposed on the respondent, certainly not in the absence of a crystal clear requirement therefor in the Communications Act.

If Congress had intended to require the Commission to hear and determine a controversy of this character involving questions of local law and to review such determina-

tion by a three-judge federal court, it would surely have included appropriate provision therefor. The specific duties given to the Commission by the Act are a sufficient responsibility without extension thereof to causes of this character by a tenuous construction of the Act. The absence of such provisions is a clear indication that Congress did not intend to give the Commission that jurisdiction.

7. Giving the Commission Exclusive Jurisdiction Would Establish an Undesirable Precedent

If petitioners' contention that the Commission has exclusive jurisdiction is accepted, it would require the following actions to be litigated before the Commission rather than in the state courts:

> 1. An action by lessee to require lessor to transfer the station and equipment to lessee or to cancel the lease because of some fraudulent misrepresentation of the lessor.
>
> 2. An action by lessor to require lessee to comply with the various provisions of the lease (R. 21), such as maintaining the leased property in first class condition and installing new equipment as provided in paragraph 4; keeping the property insured and replaced as provided in paragraph 5, delivering possession to lessor at end of lease as provided in paragraph 6, or on termination of lease because of default as provided in paragraph 8, or defaults mentioned in paragraph 12, or because of termination of lease as mentioned in paragraphs 13 and 14.

Likewise actions affecting the operation of the station by lessee could arise in controversies with the lessor over the lease of the space occupied by the station or with third parties who might claim a right to the leased property

under a prior lease or sales agreement with lessor or as purchaser of a part or all of the property at a sale under an execution against lessee. Determination of the actions mentioned above would probably affect the operation of the station by lessee, yet it is apparent that no sound basis exists for contending that the Commission would have exclusive jurisdiction of all such actions and such a decision would establish an undesirable precedent of requiring the Commission and three-judge federal courts to determine a great variety of controversies which should properly be determined by the state courts.

We believe the foregoing is a fair analysis of the Act and that to construe it to give the Commission and federal courts exclusive jurisdiction of this action would be unreasonable and contrary to fundamental principles relating to the division of judicial authority between the state and national governments.

IV.

THE STATE COURT HAD JURISDICTION OF THE ACTION AND PETITIONERS ASSENTED THERETO

The question of fraud in procuring the lease is certainly one that is within the general jurisdiction of the state court. The petitioners, having asked both courts below to determine the question of fraud in connection with the lease, have no right, after an adverse decision, to question its jurisdiction as they have done. This will be discussed further under appropriate sub-headings.

A. The Primary Jurisdiction Doctrine Did Not Deprive the Court Below of Jurisdiction

Petitioners assert (p. 77) that the primary jurisdiction doctrine gives the Commission jurisdiction. We do not

believe this question is properly before this court because it was not raised in the courts below. In any event the doctrine is not applicable. Administrative agencies have primary jurisdiction only of matters committed to them by statute which are ordinarily problems of administration such as regulation of rates and operations. In *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139, in discussing the application of the primary jurisdiction doctrine the court said:

> "Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked."

No question calling for "technical knowledge" in involved in the present case. The qualifications of the lessee to properly operate the station are not questioned.

As heretofore stated, we do not believe the Commission ever had jurisdiction of the controversy over the cancellation of the station lease but even if it had primary jurisdiction thereof, it cannot now be successfully urged by petitioners. The doctrine does not hold that the administrative agency has *exclusive* jurisdiction, but only *primary* jurisdiction. The cases cited by petitioners (p. 77) are ones which required technical knowledge on a question which has been exclusively committed by statute to an administrative agency and therefore have no application to this case.

Even if the Commission had primary jurisdiction, the court below also had jurisdiction. The petitioners not only failed to make a timely claim that the Commission had primary jurisdiction but, in fact, the Commission was requested to extend the time of its consent to the assignment of the license until final adjudication of this very

action (Ex. 33, R. 665, 669). Petitioners assert that jurisdiction of the court over the subject matter cannot be waived, but no authority is cited that the right to have a controversy determined by the tribunal having primary jurisdiction cannot be waived by requesting a decision by a court that also has jurisdiction. The failure of the petitioners to have made a timely claim that the Commission had primary jurisdiction would seem to constitute a waiver of any such claim.

B. The Fact That the License is Incidentally Involved Did Not Deprive the Court of Jurisdiction

Petitioners asserted (p. 35) that the Commission has exclusive jurisdiction of all matters involved in this action because the license to operate the station was issued by the Commission under the authority of the Communications Act and its transfer is involved. The fallacy of petitioners' position is shown by decisions of this court in cases involving patents. The statute vests exclusive jurisdiction in the federal courts "of all cases arising under the patent rights or copyright law of the United States." Notwithstanding this grant of exclusive jurisdiction it has been uniformly held that state courts have jurisdiction of actions involving rights arising under a patent.

In *Pratt* v. *Paris Co.*, 168 U. S. 255, 259, the court held that evidence of the invalidity of a patent and its infringement of a prior patent would not oust the jurisdiction of a state court in an ordinary action of assumpsit, the question of the invalidity of the patent being incidental to a defense of the lack of consideration and of a rescission of the contract. The court further held that the power of state courts to determine questions arising under the

patent laws *is not precluded by the federal statute excluding them from jurisdiction of cases arising under those laws. On this subject the court said:*

> "the state court had jurisdiction both of the parties and the subject-matter, as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of the defenses, the defendant claimed the invalidity of a certain patent."

See also *Luckett* v. *Delpark*, 270 U. S. 496, 502; *Gulby* v. *First National Bank*, 299 U. S. 109.

In *Becher* v. *Contoure Laboratories*, 279 U. S. 388, 391, jurisdiction of a state court to establish a trust ex maleficio in letters patent was involved. In upholding the jurisdiction of the state court, Justice Holmes made this pertinent statement:

> "That decrees validating or invalidating patents belong to the courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that, if it is true, an important patent is void."

The foregoing language is by analogy applicable to the present case for the requirement of the Communications Act that the license cannot be transferred without the consent of the Commission "*does not give sacrosanctity to facts that may be conclusive upon the question in issue.*" In other words, the fact that Commission's consent is necessary to an assignment of the license does not prevent the state court from determining that under the facts proven the lease was fraudulent and void.

C. Petitioners Cannot Question the Jurisdiction of the Court After Assenting Thereto

As elsewhere shown the petitioners did not at any time object to the jurisdiction of the court to pass upon the validity of the station lease until in their motions for rehearing in the court below. In fact they asked both the trial court and the court below to decide the case on its merits. Under those circumstances they should not be permitted to now assert that the court below was entirely without jurisdiction. Even where a statute confers exclusive jurisdiction on a federal tribunal if objection is not made to the jurisdiction of a state court, its judgment will be upheld.

In *Mays* v. *Fritton*, 87 U. S. 414, 418, the claim to the proceeds of the sale in state court of a bankrupt's property was involved. In holding that the objection to the jurisdiction of the court was too late unless made in the court below before its decision was rendered, the court said:

> "The present was the case of the foreclosure of a mortgage under the state laws. The disposition of any surplus that might arise from the sale on such mortgage, under a proceeding in the state courts, *prima facie belonged to the state courts. The subject-matter was within their jurisdiction, and under their control. If special circumstances existed which altered that result, it was the duty of the party making such claim to state them and ask a ruling accordingly.* Nothing of the kind was done in the present instance.
>
> "To be available here an objection must have been taken in the court below. Unless so taken it will not be *heard here. It is not competent to a party to assent to a proceeding in the court below, take his chances of success and, upon failure, come here and object that the court below had no authority to take*

the proceeding. This point comes before us at every term and is always decided the same way." (citing many cases.)

The foregoing case was cited with approval and followed in *Winchester* v. *Heiskell*, 119 U. S. 450.

It would, therefore, appear under the foregoing authorities that petitioners, having raised no question as to the jurisdiction of either the trial court or the court below until after its judgment but took their chances on success, should not now be permitted to raise that question.

A somewhat analogous situation existed in *Tucker* v. *Alexander*, 275 U. S. 227, 231, where an action to recover taxes alleged to have been illegally exacted was commenced without presenting a proper claim for refund as required by a statutory provision and regulation of the Treasury Department. This court held that since "during the entire course of the trial, no question was raised as to the sufficiency of the claim for refund," objection thereto could not be made on appeal.

Likewise in the present case if the petitioners or Commission had any basis for claiming that the trial court did not have jurisdiction to determine the validity of the station lease because it had not been presented to the Commission, it was waived by their failure to assert it. Furthermore, the lessor and lessee specifically requested the Commission to extend the time it had given for the assignment of the license until the validity of the lease could be determined in this action. The Commission, after consideration of the application, entered an order denying it (Ex. 33, R. 665, 669, Ex. 34, R. 664). Certainly this constituted a waiver by lessor and lessee of any requirement that the consent of the Commission should be secured before the lease could be cancelled. Likewise the Commission by not taking any affirmative action by inter-

vention or otherwise when the pendency of this case was specifically called to its attention, in effect waived any requirement that its consent to the cancellation of the lease be obtained and gave its approval to the determination by the state court of the validity of the station lease.

V.

THE JUDGMENT BELOW DOES NOT INVADE THE JURISDICTION OF THE COMMISSION

Petitioners contend (pp. 30-78) that the judgment below invades the jurisdiction of the Commission by nullifying its "order authorizing operation of the station by lessee in the public interest" and "by deciding administrative questions with respect to the transfer of the operation" of such stations. Even if it be assumed that these points are properly presented, they are not supported by the facts.

The only issue which in any way involved the public interest, namely: use of the station for propaganda purposes, was decided in petitioners' favor in both courts below and petitioners are not in position to complain of such decision. Nor is there any merit to the claim that this is an action to nullify an "order" for it was merely a consent to the assignment of the license and was only incidentally involved. Neither of these points should be considered because they were not raised until after the judgment of the court below. We will briefly answer petitioners' argument on these points under appropriate subheadings.

A. The Judgment Below Does Not Nullify an Order of the Commission

Petitioners assert (pp. 66 and 78) the judgment nullified an order of the Commission and therefore the court

had no jurisdiction because review of such an order is limited to a three-judge court under Sec. 402 (a). Petitioners' argument is unsound for the "order" related only to an assignment of the license and not to a transfer of the station. It was recognized by all parties and by the court below that the court did not have jurisdiction over the transfer of the license. Furthermore the court below specifically held:

> "The claim that this was an action essentially to annul or set aside an order of the Federal Communications Commission is wholly without merit * * * and, in addition thereto it was eliminated from the case by the pleadings they filed in their own behalf" (R. 798).

Its decision on this question is correct and should be accepted by this court. *General Trading Co. v. State Tax Commission of Iowa*, 322 U. S. . . ., 88 L. Ed. Ad. Op. 914, 915.

The license has not been cancelled but is still outstanding and it is to be assumed that the Commission will consent to its assignment back to the Society or issue a new license to the Society when application is made therefor.

No order was entered by the Commission relating to the transfer of either the license or the station and none was requested. The Commission merely gave its consent to the assignment of the license. It is described in the heading and five times in the body of the instrument as a "consent." The word "order" does not at any time appear in it nor is it in substance an order. It expressly provides:

> "The actual assignment of the station license * * * shall be completed within 30 days from date hereof; *otherwise this consent shall be void and of no effect.*"

It merely provides that if the assignment was not made within the thirty days the consent became "void and of no effect." There was no requirement express or implied that the assignment be made. The Society and lessee could have waited until the "final adjudication of this action" as mentioned in their application (Ex. 33, R. 665, 669) and then made a new application for consent to the assignment or they could have appealed from the Commission's order but instead of doing either they took their chances on the outcome of this action. If they are unhappy about this situation, they have only themselves to blame.

Petitioners (p. 67) have cited *Venner v. Michigan Central R. R. Co.*, 271 U. S. 127, to support their claim that the court below did not have authority to vacate an order of the Commission. As heretofore shown, the Commission did not order the transfer of the license, but merely consented to such transfer. The foregoing case is distinguishable from the present case in many respects. In that case the court found "that the suit was essentially one to annul or set aside an order of the Interstate Commerce Commission" authorizing and approving the issuance of bonds in payment for equipment. The *statute gave the Commission exclusive jurisdiction of questions involving the issuance of bonds.* In the present case there was no order to vacate and the Commission never authorized or approved the leasing of the station. Its consent to the transfer of the license was only an incidental matter, and the Communications Act gives the Commission no jurisdiction to determine the validity of the station lease, which was the main issue in the present case. In *Central New England Ry. Co. v. Boston and Albany R. R. Co.*, 279 U. S. 415, 420, the Venner case is distinguished so far as the present case is concerned.

Other cases cited by petitioners relating to the Interstate Commerce Commission are cases involving orders made directly affecting questions which under the law were within the exclusive jurisdiction of the Commission.

Petitioners assert (p. 35) that the Commission's consent to the assignment of a license includes approval of the transfer of the station. In fact, they state that "the jurisdiction of the Commission to issue licenses, approve transfers of radio stations and otherwise determine matters of public interest must be jealously safeguarded." They have not and can not point out any provision of the Communications Act justifying the statement that the Commission has jurisdiction to "approve transfer of radio stations." They merely assume that fact and then base their argument on that assumption. They constantly refer to the expert knowledge of the Commission but that relates to the equipment and operation of a station. *It does not require any expert knowledge of radio to determine whether a station lease was procured by fraud.*

In a further effort to support their claim that the license includes the station they criticize the court below (p. 36) for treating the license of the station separately and insist that jurisdiction of the Commission over the assignment of the license included jurisdiction over the transfer of the station.

We believe we have shown that the court below was entirely justified in treating the license and station separately. In any event, it was the petitioners who are responsible for such separate treatment. They specifically alleged that the Commission "has and conceded that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of license to operate said radio station" (R. 21). This alle-

gation was not denied by anyone and was specifically admitted by respondent in his reply (R. 36). The court below held exactly as petitioners had contended, namely, that the Commission had jurisdiction over the assignment of the license and the state court had jurisdiction over the station and the lease thereof (R. 797-8). Furthermore, the Society and lessee asked the Commission to extend the time named in its consent to the assignment of the license "until final adjudication of the (this) action" (Ex. 33, R. 665, 669. As we have elsewhere shown (p. 34), the Communications Act does not justify the claim that a license to operate a station also includes ownership or possession of a station. Throughout the Act the words "license" and "station" are given a separate meaning. Clearly the judgment of the court below did not nullify an order of the Commission.

B. Respondent Could Not Have Maintained a Suit Under Sec. 402 (a)

Petitioners assert (p. 78) that respondent should have intervened before the Commission and then if dissatisfied sought a review under Section 402 (a). It is doubtful if respondent could have intervened because his objections to the transfer of the station were based on fraud on the membership of the Society in the making of the lease which was not a question of interest to the listening public. But even if allowed to intervene and we assume that the Commission's consent was an "order," still respondent could not have maintained a suit under the provisions of Section 402 (a). Such is the holding in *Pittsburgh and West Virginia Ry. Co.*, 281 U. S. 479, 487, which held that a minority "stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order," such order

being one entered by the Interstate Commerce Commission for the abandonment of a railroad station. None of the cases cited by petitioners appear on careful examination to hold otherwise.

Petitioners also imply that respondent should have intervened in the request made to the Commission to extend the time for assigning the license. No sound reason existed for respondent to intervene. This action was then pending involving the validity of the lease and the respondent as well as the petitioners recognized that the state court had jurisdiction to determine that question.

Since respondent could not have maintained a suit to review the consent of the Commission to the assignment of the license even if it be assumed that it was an order for the transfer of the station as well as the license, it seems clear that the Act cannot be construed to give the Commission excluive jurisdiction to determine whether the lease was fraudulent.

C. The Public Interest Was Not Involved

Petitioners discuss (pp. 40-65) the pleadings, the trial and the opinion of the court below in a detailed but unsuccessful effort to support their claim that the public interest was involved. No such interest was involved other than the use of the station for propaganda purposes which was decided in petitioners' favor by both courts below. It is significant that no objection was made by petitioners to the courts below deciding any question of public interest and they were quite willing to accept a decision thereon providing it was in their favor.

We do not believe it necessary or proper to discuss the evidence on this point for the decision of the court below should be accepted thereon and so far as the plead-

ings and opinions are involved they speak for themselves. *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. ..., 88 L. Ed. Adv. Op. 914, 915. However, because of some statements of the petitioners which reflect on the court below as well as the respondent, we will consider them briefly.

Petitioners' discussion of the trial (p. 43) is substantially limited to the statement that respondent did not appear at the trial. This fact is wholly immaterial but the court should have the facts. The record shows there was no reason for him to appear for all facts to which he could have testified in support of the allegations of his petition, and not admitted in the answers, were proven by depositions. Dr. Johnson very properly devoted his time to caring for his patients instead of attending the trial.

Petitioners (pp. 44-60) discuss the opinion of the court below. The statement of petitioners (p. 47) that the court found that there was no plan of the Society's directors "to procure for themselves, their friends or associates control of the radio station" is not correct. The court specifically found that the directors left the disposition of the station to President Bradshaw (R. 752) who "prompted the organization of lessee by his friends and those of Gillin in order to take over the station" (R. 760). Thus the station passed into the control of Bradshaw's friends for a grossly inadequate consideration. The plan was similar to one followed by the Society's officers including Bradshaw when a number of years previously they diverted $2,000,000 of the Society's assets to a company controlled by their friends. The court held it was a fraudulent transaction and required them to return the money to the Society (R. 364). See *Folts* v. *Globe Life Insurance Co., et al*, 117 Neb. 723, 223 N. W. 797.

Petitioners sarcastically refer (p. 44) to the court's conclusion that the lease rental is inadequate and state the court "substituted its own judgment for that of all witnesses." This is directly contrary to the record for three of *petitioners'* witnesses on cross-examination testified that from the standpoint of the Society the lease rental should be "higher" (Ryan, R. 587), should be "nearly double" (Cowles, R. 617), and should be "a great deal more—maybe twice more" (Hough, R. 642). Also petitioners (p. 45) sarcastically refer to the court's "cavalier treatment" of the "public power issue." But strange as it may seem, petitioners criticize the court for deciding according to their contention.

Petitioners (pp. 49 and 76) imply that the court below was opposed to Gillin's continued management and substantial interest in the lessee which had been approved by the Commission. This is a distortion of the opinion for it does not object to Gillin's continued management or to his interest in the lessee but it does very properly question the propriety of his receiving in connection with the lease "a one-fourth interest in this 15-year lease on this valuable radio station for a nominal investment and in addition thereto, in effect, a $25,000 bonus from the Society" (R. 760). Those facts did not appear in the application to the Commission.

Petitioners (pp. 50 and 76) criticize the court for its attitude concerning the financial condition of the lessee and state it relied on the same financial data as contained in the application to the Commission. Petitioners fail to recognize that the court below and the Commission were considering such data from different viewpoints, the Commission merely to determine whether the lessee appeared to be qualified to operate the station while the court was

interested in determining whether the lease was fraudulent. Petitioners (pp. 52 and 60) mention the cost of the property but the record cited does not support their statement. Reference to the cost is merely a part of a hypothetical question and not an answer (R. 781).

Petitioners imply (p. 60) that the court below treated the license as a property right but that is directly contrary to the record for the court below says:

> "Such a license is a permissive grant of a privilege and creates no vested property rights in the licensee" (R. 797).

In discussing the decree, petitioners (p. 61) assert that the court "arrogated to itself the Commission's function of determining whether a particular broadcast should be carried on, and if so, by whom." That is certainly an unjustified characterization of the court's determination that the station lease was fraudulently procured.

The statement (pp. 61, 62) that the original license assigned to the lessee expired in 1943 and that new licenses have been issued is not supported by the record. The application for consent to the assignment states that the license expires "6-1-44." (Ex. 29, R. 375, 385). Petitioners refer to new licenses and the appendix contains copies but their source is not disclosed. They were not in the record in the court below and there does not appear to be authority for thus presenting further evidence.

The statement (p. 62) that the judgment "immediately vitiates the existing license," is not correct for it is still effective and can be assigned to the Society without interruption in the operation of the station. No doubt the court had in mind the filing of an application for consent to the assignment when it ordered "that generally everything be done to restore the parties to their original position" (R. 761).

The dilemma which petitioners mention (p. 64) is purely imaginary for the Commission can still exercise necessary control over the operation of the station by withholding consent to the assignment of the license to anyone not properly qualified. There is no reason to believe that the Commission would not permit the Society to again resume operation or to transfer the license to any other qualified operator to whom the station and equipment is transferred.

It is proper to assume that the Commission will fulfill its duty of seeing that broadcasting is continued by this station and that it will therefore consent to the transfer of the license to the Society or to any qualified operator to whom the station is transferred. A refusal by the Commission to give such consent would countenance and further the fraud of the petitioners in their effort to deprive the Society of the use of its station. The comity which exists between the state and federal governments should assure the cooperation of the Commission in the continued operation of this station.

Many cases are cited by petitioners (pp. 65-78). The principles involved in those cases so far as applicable to the present case have heretofore been discussed by us and it does not appear that petitioners have cited any authority which would justify this court in holding that the court below did not have jurisdiction to determine whether the station lease was fraudulently procured, particularly in view of the fact that petitioners assented to the jurisdiction until after an adverse decision in the court below. Despite the many general statements of petitioners, they have failed to point out any actual question of interest to the listening public other than the use of the station for propaganda purposes, which was decided in their favor.

Petitioners' expression of fear (p. 76) concerning future tranfer of stations in Nebraska depends on the validity of the transfers. If a station is fraudulently leased or sold, the courts of Nebraska may be expected to properly protect the owner of the station, and in such a way as to not conflict with the Commission's proper function.

Summarized, petitioners' contention is that the listening public will be better served by lessee's operation of the station under its fraudulent lease and the Commission will help the lessee to accomplish that wrongful purpose. It is unsupported by the record and is an unjustified reflection on the Commission's performance of its duty.

CONCLUSION

No sound reason appears why the Communications Act should be construed to give the Commission exclusive jurisdiction over this action and to hold that the court below was without jurisdiction to cancel the lease. Petitioners asked both courts below to decide the case on its merits and after an adverse decision they should not be premitted to question the courts' jurisdiction on the unjustified basis that the public interest would be better served by lessee's operation of the station. The only members of the public who would thus benefit are the lessee's stockholders and their request for judicial aid to retain those benefits should be denied.

Respectfully submitted,

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